Central Law Journal.

ST. LOUIS, MO., NOVEMBER 29, 1912.

THE OLD RULES OF PRACTICE FOR FEDERAL COURTS OF EQUITY.

As new rules of practice for the Courts of Equity of the United States have been promulgated and will be in effect on February 1st, 1913, it would seem not uninteresting to take a backward glance, even to the primeval days of our Republic, at the practice that has been in force.

At this beginning we find Courts of Equity contra-distinguished from courts at common law, the Act of Sept. 24th, 1789, providing that: "The forms and modes of proceedings in causes of equity and of admiralty and maritime jurisdiction shall be according to the course of the civil law." It was said that this was understood to mean that by the statute there were adopted the principles, usages and rules of the Court of Chancery in England. Monro v. Almedia, 10 Wheat. 473.

On May 8th, 1792, the statute of that date seems to construe the prior act as requiring that conformity in common law causes now expressed in Sec. 914, embodying the Act of June 1, 1872, on this subject. It provides also for the supreme court prescribing "regulations" for courts of common law, of equity and of admiralty and maritime jurisdiction.

It was not until 1822, thirty years later, that the supreme court prescribed "Rules of Practice for the Courts of Equity of the United States." These rules were thirty-three in number and the last two of them provide for the circuit courts making further rules and regulations not inconsistent, and, where they may not apply, then "the practice of the circuit courts shall be regulated by the practice of the High Court of Chancery in England."

How greatly the circuit courts exercised their privilege of making "further rules and regulations" after the rules of 1822 were prescribed, or before that made "alterations and additions" under the power granted by the Act of 1792, so as to abate from "the course of civil law," that is to say, the principles, rules and usages of the Court of Chancery in England, it would be more tedious than probably profitable to inquire. It may be inferred, however, that there was some regulation by the circuit courts not altogether satisfactory or some necessary resort to the rules and usages in "the practice of the High Court of Chancery in England." And this it may well be conceived was accompanied with something of embarrassment so far as lack of certainty was concerned, it not being altogether clear whether there was meant the practice in that "High Court" contemporaneously or prior to the Declaration of Independence.

At all events, we find that in 1842 the supreme court again prescribed rules to take the place of those prescribed twenty years before. Instead of there being only thirty-three in number, there were ninety-one, of which all, except XVIII, XIX, XLI, LXVII, LXXXII and LXXXIX, have remained unchanged to this day, and those excepted, not abrogated, but merely amended.

In Rule XC we find that the corresponding rule in those of 1822, which provided for omissions being taken care of by the practice of the High Court of Chancery in England, and that "the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice." The abundance of caution we see here expressed suggests the reason for the supreme court greatly extending the rules that were formerly made. They wished to cover everything possible to be covered. These rules have had only three new rules added to them, one for deficiency judgment, one regarding ap-

XUM

peals from a decree granting or dissolving an injunction and one as to bill brought by stockholders, each of them suggested by some exigency in a case. They have lasted a long time, and compared to the 1822 rules, they were the result of an ambitious performance. They differed from the older rules it may be said, in that they sought to provide a practice in equity courts, while the older rules aimed at the convenient adaptation of the practice in the English Court of Chancery to American conditions. At bottom the older and the newer rules were substantially the same. The later rules made it easier for court and counsel to ascertain what was required of them, and there was no question remaining, except outside of their abundance of detail, as to what in "the practice of the High Court of Chancery in England" might "reasonably be applied consistently with the local circumstances and local conveniences," in this country.

The old English equity practice, in its Court of Chancery was just as much revered seventy years ago as it was ninety years ago, but in some things of it there was doubt, or doubt could be claimed as to their suitability in application to our conditions. and the supreme court could only allay controversy as to such things by being as specific as possible. Therefore the newer rules took on detail, while remaining fundamentally the same as before.

Those days, however, were just as innocent of the spirit of reform in judicial procedure as in the first half century of our Republic's life. All of the old formal, technical things remained. The bill of complaint must have its formal parts, such as confederacy clause, interrogative part, etc., and scandal and impertinence must be attacked with all the solemnity of procedure that their great *importance* demanded. Then demurrer or plea had to have its technical treatment, and any and every answer must have its technical replication, whether anything really material were added to the record or not. The stately grace of procedure must be preserved, that at least its dignity be preserved, though its importance might not be so manifest.

It is a wonder these rules of 1842 have outlasted man's allotted span of three-score and ten years, as we hope to show in our editorial succeeding this, when we will discuss the rules just promulgated in the revolution in procedure they provide for, a revolution so responsive to present-day demands both in America and in the mother country, to which the present rules tie us back to what she repudiated long, long ago.

NOTES OF IMPORTANT DECISIONS

CIVIL PROCEDURE—APPELLATE COURT ENTERING FINAL JUDGMENT ON THE MERITS.—N. Y. Law Journal of November 15, 1912 reports the case of Bonnette v. Molloy, just rendered by Supreme Court of New York, in Appellate Division, applying a New York Statute taking effect September 1, 1912, authorizing final judgment on the merits without the necessity of a new trial.

The opinion in the case, unanimously agreed to, says: "I am of opinion, that the Appellate Division has now been vested with authority to grant the final judgment which in its opinion should have been granted by the trial court, not only in all equity cases, but in all actions tried by a court without a jury, and in jury causes as well where the evidence was insufficient to cause the submission of the case to the jury and the question has been duly presented by a motion for the dismissal of the complaint, provided, however, all material competent evidence offered by respondent has been received." The opinion further along, says there is an exception "in jury cases, where the constitutional right to trial by jury exists and the right to the judgment depends upon conflicting questions of fact and inferences, which must, in such cases, ultimately be left to the jury."

The N. Y. Law Journal speaks editorially about "the importance of the new departure for which this decision stands," and appreciating how great this is, we feel, that it is probably a matter of regret that constitutional limitations make it so absolutely necessary that cases have to be remanded where there has been a jury trial and there are disputed questions of fact or inferences for a jury to determine.

This being the case, however, the very fact that the province of the jury is so sacred and inviolable, statute might provide that appellate courts should declare to have been conclusively determined all questions of fact and inferences not affected by erroneous rulings and confine the second trial to special findings and let the court below pronounce the judgment thereon. In other words, only in the first trial should a general verdict be rendered. It seems illogical to talk about the jury's constitutional right to find facts and then let it have only a half-way sort of recognition.

NOTES OF RECENT CONTINENTAL DECISIONS.

Bodily Injury by Means of Newspaper Articles.—A German newspaper had in two articles accused the secretary of a town government of graft in connection with an insurance deal. This caused a councilmanic investigation with the result that, not only was the secretary acquitted, but it was positively shown that he had not been guilty of any graft whatever. Action for libel was brought against the editor, and conviction followed. The secretary, a man very sensitive of his honor, took the accusation so much to heart, that his health became completely shattered, and it became necessary for him to resign his office.

Sec. 823 of the German Civil Code makes everybody liable in damages who shall, maliciously or negligently and unlawfully, cause damage to the health of any other person. The secretary, after conclusion of the criminal action, brought suit against the editor for damages, which he fixed as the difference between his former salary and the pension he had received since his resignation; the period included ran from July 1, 1908, to March 31, 1911.

It appears that the connection between the newspaper articles and the breaking down of plaintiff's health was proven to the satisfaction of the Superior Court of Hamm, for on May 24th, 1912, it gave judgment for the plaintiff as prayed for.

Either American Municipal officers must be of much tougher stuff than their brethren in Germany, or else graft is there considered a much more heinous crime than here.

Conflict of Judgments.—Another curious case has aroused a great deal of interest and conflict in Germany. The District Attorney of Berlin brought action against a bookseller for distributing an indecent book. The book was declared indecent, and in accordance with the statute the Court ordered all copies of the book in the hands of the author, publisher or agents, and intended for distribution, to be so mutilated so as to make them unsalable. At the same time the District Attorney had also brought action, in another department of the same Court, against the author and publisher, but in this case, the judgment was that, neither the whole, nor any part of the book was indecent, and the defendants were acquitted. Under the first judgment the whole unsold part of the last edition had been mutilated, so what did the author and publisher now do? They had a verbatim new edition printed and offered it for sale. But the first judgment had not been set aside, so the authorities, under its sanction, proceeded at once to mutilate the new edition also.

The curious result is, that the author and publisher have a decision by a court of proper jurisdiction, that the book in question is lawful and may be sold. Still the prosecutor, by virtue of a decree by an equally competent Court, proceeds lawfully to destroy all copies of this lawful book.—Que faire?

1,122,373 *civil cases* were tried in the German County Courts during 1911; before the Provincial Courts, 340,109, and before the Superior Provincial Courts, 23,420. How long does it take to get a case tried in Germany? From Statistics published it appears that in the County Courts, after issue joined, 3% were tried within one week, 89.9% within one month, and 7.1% later. In the Provincial Courts, the percentages are as follows: Within one month, 76.2%, between one and two months, 15.4% and more than two months, 8.4%.

The time elapsed between filing of the complaint and final judgment appear as follows:

County Courts: less than three months, 52.4 per cent; three months to one year, 42.4 per cent; more than one year, 5.2 per cent.

Provincial Courts: less than six months, 47.9 per cent; six months to one year, 29.1 per cent; more than one year, 24.9 per cent.

Superior Provincial Courts: less than six months, 69.7 per cent; six months to one year, 23.7 per cent; more than one year, 6.6 per cent.

It also appears that, for some reason, not much more than 25 per cent of the cases tried require final judgment (Kontradiktorisches Endurteil); how the others are settled, does not appear.

Institut de Droit International received the Nobel Prize last year; with the award of the prize goes the obligation of the prize taker to give a lecture before the awarding Board at Christiania, so naturally the institute held its 1912 meeting in that city, from August 24th to September 1st, 1912, under the leadership of

XUM

its president the well-known Norwegian jurist, statesman and diplomat Francis Hagerup. A number of important questions were taken up for discussion and action. First the Institute accepted the offer from the Carnegie Institute to become its counsel in matters of international law. Other matters discussed included: Conflict of laws of property in bankruptcy cases (Prof. Diena, Turin). The effect of war upon international treaties and agreements (Profs. Politis, Poitiers). A committee of eleven was appointed to prepare two drafts for an international maritime war-code, the one to take as its foundation the absolute inviolability of private property, the other to express the English standpoint. The proper composition of the permanent Hague Court was thoroughly discussed, and the preliminary steps were taken to prepare a full bibliography of the whole of the international law.

A. T.

REFORM OF LEGAL PROCEDURE IN ENGLAND.

Some of our contemporaries and many lawyers delight in holding up the administration of justice in England as a model of perfection where delays and technicalities never obstruct justice.

It may be that the operation of the English Judicature Act occasions less delay than many American codes of procedure but that it is an ideal system is far from being the truth. The English law journals for the last few months have been filled with complaints against the "delays of justice in England." There has been demand for new judges and also for needed amendments to the judicature act.

Demand for More Judges.—Recently the Attorney General has vitally interested himself in the reform of procedure in England and secured from Parliament one new judge as well as a Commission to Revise the Rules of the Judicature Act.

The Attorney General had little difficulty in convincing the House of Commons of the urgent necessity for an additional King's Bench judge; it was less easy for him to withstand the demand put forward by one of his own supporters, and which became general as the debate proceeded, for the immediate appointment of two. The case which was established beyond contest two and a half years ago for this increase of judicial strength has repeated itself in the short period of twelve months, during which the staff has been again lowered to its former level. Arrears had risen again to the high-water mark of 1909-10, and it was abundantly clear that suitors would continue to suffer by delay so long as the present inadequate provision for maintaining the constant running of the courts was persisted in.

The London Law Journal (Nov. 2, 1912) says: "It is satisfactory to have the assurance of the Attorney General that any necessity which may arise for a further appointment will be met by a motion for an Address to the Crown, without the formality of debate. Still, it is true, as Mr. Herbert Craig pointed out, that the existence of arrears is not sufficient in itself to justify the constant demand for additional judges; the evil ought to be tackled at its source. Nobody recognizes this more than the judges themselves, and the last 'annual' Report of their Council (though it is twenty years old) put on record views as to reform in legal administration which are as advanced as any propounded by the lay critics of the law. Nothing was more significant in the whole of the long debate on the Government's motion than the appreciation which was expressed on all sides of the work of the Judges, and the expressed willingness to add, if necessary, to their numbers as part of an approved scheme of reform. The public demands an improved Judicature—not a reduction in the judicial staff—and no one is blind to the necessity of improvement."

Sir Rufus Isaacs, a member of Parliament, gave new expression to the demand for reform in procedure when he declared "that the litigant who desires redress or the suitor who has a grievance must find an open door the moment he presents himself.

That is the ideal to which every scheme of reform in procedure must be addressed."

The New Judicature Commission.—No small part of the easy victory which the Attorney General gained over the forces of opposition within his own camp in the debate for the appointment of an additional judge was to be attributed to his promise of a Royal Commission to inquire into the various reforms which have been suggested since the condition of the courts became a serious question with the English public.

In discussing the insistent public demand for reform in procedure in England, which has borne fruit in the promise of the government to appoint the new Judicature Commission, the London Law Journal says: "The objections to the present system which people mostly have in view were indicated by a series of proposed amendments to the government's motion, which were withdrawn only on the promise of the Commission. They included the reorganization of the business of the King's Bench, the reform of the circuit system, the provision of continuous sittings of the courts, the extension or rearrangement of the present court hours, the reductions of the long vacation, and the fixing of a limit of age for judicial service. Other points—such as the question of a judge's age on appointment—were raised during the debate, and the Attorney General intimated that the terms of the reference would be wide enough to cover every proposition that had been mooted in the House, while excluding other matters—such as, we assume, new procedure rules and regulations—which would involve too long and elaborate an inquiry. In the discussion on the address in the House of Lords, the Lord Chief Justice welcomed the appointment of the Commission on behalf of the judges, and there can be no doubt that it will be equally welcome to both branches of the profession. In the matter of improved administration of justice, the interests of those who practice in the courts are identical with those of the general public—lawyers have, in fact, a more pressing and intimate concern in the subject—and the demand which made itself heard in the Commons for the minimization, or even the exclusion, of the legal element on the Commission is only on a par with that type of ignorance or prejudice which at one time debarred lawyers from any interference in the work of legislation. It is only necessary to look at the work of previous Judicature Commissions to see that judges and practicing lawyers have been as alive as any to the wants of the community, but it will be all to the good if, by a substantial infusion of the commercial element in this new inquiry the necessary driving force is added to secure the speedy carrying out of the needed reforms."

We trust our American friends and contemporaries will now refrain, to some extent at least, of apotheosizing the English Judicature Act and English methods of procedure and admit what is really the fact, that both Anglo-Saxon nations are laboring with the same problem and that America is not "a hundred years behind England" in matters of procedural reform as has been so often argued.

It is true that England tried some very radical departures in her Judicature Act, one of which was to abandon certainty in pleading, permitting a cause of action to be merely indorsed on the writ in the most abbreviated and general language, making the declaration or petition unnecessary. But this has not worked out to the complete satisfaction of the English lawyer and many complaints are published in the English law journals over the cumbersome procedure to which this "simple" first pleading gave rise. Indeed, it has been alleged that defendants have taken advantage of the right extended by the act to file repeated bills of particulars calling for information on many minor issues to the great delay and obstruction of justice.

We hope, therefore, that our American reformers will not be too quick to adopt some apparently attractive scheme of pro-

cedure, and by their enthusiastic ignorance commit the bar to a new procedure that has no other advantage than its crude novelty.

It is rather to be hoped that the entire bar will rally around the new Committee on Reform in Procedure appointed by President Kellogg, of the American Bar Association, of which Mr. Thomas W. Shelton, of Norfolk, Va., is the chairman. Mr. Shelton has been a contributing editor of this Journal for some years, and our readers are familiar with his views on the subject of reforming procedure.

Mr. Shelton stands with the editors of this Journal for every reform to simplify pleading and expedite procedure that will not disturb the fundamental principles upon which all procedure rests and which may be summed up in the maxim quoted by Mr. Shelton in opposition to certain radical suggestions that had been proposed, to-wit: "That what is not judicially presented shall not be judicially decided."

There are many ways in which procedure may be simplified without indiscriminately destroying the whole system and throwing the administration of justice into unnecessary confusion. A. H. R.

HAS OUR CONCEPTION OF TRIAL BY JURY ANYTHING TO DO WITH THE DELAYS AND UNCERTAINTIES IN THE ADMINISTRATION OF JUSTICE.

In considering methods of reform in judicial procedure and how to do away with the delays and uncertainties in the administration of justice, of which there is such general complaint, it is necessary that we find, if we can, the causes of these uncertainties and delays. If we know the cause we can probably find the remedy. I believe that very many of the evils complained of result from our modern American conception of a trial by jury, and I want to express some thoughts that have come to me on this subject.

Trial by jury is defined by the Supreme Court of the United States as follows:

"Trial by jury in the primary and usual sense of the term at common law and in the American Constitution is a trial by a jury of twelve men in the presence and under the superintendence of a judge, empowered to instruct them on the law and advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if, in his opinion, it is against the law or the evidence." Capital Traction Co. v. Hoff, 174 U. S. 1; U. S. v. Philadelphia & R. R. Co., 123 U. S. 113, 114.

And it is held in one of these cases that a jury trial before a justice, who is not authorized to exercise these necessary powers, is not a trial by jury in the sense of the common law. The tribunal then is dual in its character. There is the judge whom we regard as learned in the law, and capable of passing upon the relevancy, pertinency and weight of the evidence, who needs no instructions either upon the law or the fact, and who is neither corrupt nor corruptible.

There is the jury of twelve men, who, in our modern conception, are unlearned, and so grossly ignorant and incapable of discrimination that the judge has to decide what evidence they can hear and instruct them as to its weight and sufficiency, and who must also be instructed as to the law, and who are regarded as either corrupt or corruptible. It must be upon some such theory as this that we treat our juries as we do and have adopted the rules of pleading and evidence which are applied to jury trials. In cases that are tried before the judge, without a jury, we do not inquire whether he has made up or expressed an opinion in the case; whether he has talked with any of the parties or witnesses, and whether he has any bias or prejudice for or against either party. There is no power, except his own, to exclude from his consideration evidence that may be offered by either party, and if he hears evidence which

is irrelevant and which would be incompetent if offered before a jury, it is not error. The only thing that is looked to is the final result of the trial and if the judgment can be sustained by the evidence it is sufficient and it will not be reversed because of incompetent, irrelevant or improper evidence having been heard by him. We do not lock the judge up until he has rendered his judgment. We do not put him in the custody of the sheriff and allow him to talk to no one until after he has rendered his decision; but we allow him to run at large and we act upon the presumption that he will not allow any improper approaches, nor will he be corruptly or improperly influenced in his decision; and it is to the credit of the judiciary of this country that this confidence in the judges has rarely ever been misplaced.

But how differently we treat a jury. In the earliest days in England a jury was made up of people supposed to know most about the occurence to be investigated. They were the witnesses to the transaction, so far as they could be gotten, and the neighbors of the parties and citizens of the neighborhood. But under our modern American system, we rigidly exclude from the jury every man who has formed or expressed an opinion about the matter to be investigated, or any man who has any bias or prejudice for or against the parties, or any man who has read an account of the transaction in the newspapers or talked with the parties or the witnesses, and for many other causes. And if the case is a criminal one, involving possible capital punishment, we rigidly inquire whether the persons offered for jurymen are opposed to capital punishment. All of these objections to the juries are manifestly based upon the idea that the ordinary citizen is either not capable of, or would be unwilling to, decide a case contrary to his own preconceived opinion; that he cannot or will not be governed solely by the evidence adduced on the trial; that he cannot lay aside his bias or prejudice against individuals and act fairly between them; that he cannot and will not administer the law if he is of opinion that the law is unwise, or if it does not meet his views of public policy.

Then after the jury is impaneled we have built up an elaborate system of rules by which the court is governed with reference to the admission of evidence to be heard by the jury. In the first place, we have a system of pleading by which we endeavor to present a single question or several distinct questions to be decided by the jury, so that they will not be confused or led astray. We form issues of fact as simple in their character as possible so as to meet the limited capacity of the jury. Then the judge rigidly excludes from the jury all evidence that he considers irrelevant to this issue on the theory that the jury has not capacity enough to determine what weight or importance to give to the evidence that may be introduced before it. He excludes all hearsay testimony because, as said by Lord Mansfield, "no man can tell what effect it might have upon their minds." Lord Mansfield's language is as follows:

"In Scotland and most of the Continental States the judges determine upon the facts in dispute, as well as upon the law, and they think there is no danger in their listening to evidence of hearsay because when they come to consider of their judgments on the merits of the case they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve. But in England, where the jury are the sole judges of fact, hearsay evidence is properly excluded because no man can tell what effect it might have upon their mind."

There are many other grounds upon which evidence is excluded from the jury not necessary to mention in this presence, and the judge constantly interferes to keep the jury from being imposed upon or misled or improperly influenced by the evidence or by the remarks of counsel. Then after

the evidence is all in, the judge instructs the jury, very often quite elaborately, as to their duty, and not only as to the law governing the case, but also as to the mental processes by which they are permitted to arrive at their verdict. For instance, he tells them which party has the burden of proof and how they must weigh the evidence so as to overcome this burden. He tells them of certain presumptions that exist with reference to certain kinds of evidence arising from certain facts, and that they must give due weight to such presumptions. He tells them in a criminal case and in some classes of civil cases that the guilt of the defendant must be proven beyond a reasonable doubt, and if they have any doubt they must give him the benefit of it. And then when counsel come to argue the case, they don't argue so much as to whether the defendant is innocent or guilty, but whether the jury has any doubt or not. The jury is called upon to try its own mental condition. It is called upon to decide whether it has any doubt or not, and this is often such a perplexing question that the main issue is lost sight of, and the jury gets in such a befogged mental condition that it concludes that it had better acquit the defendant and go home.

In many jurisdictions after the jury is impaneled it is placed in the custody of the sheriff and not allowed to separate nor to hold communication with any person until the verdict is rendered. We put the jury in prison whilst frequently the accused is out on bail. Now all of these rules and this treatment of the jury is manifestly predicated upon the theory and the conception that the members of the jury are ignorant and incompetent, and that they are either corrupt or corruptible. Is there anywhere else upon the face of the earth a people who have created and who foster and keep in existence a tribunal which they regard in the same light and treat in the same way that we do our juries? I doubt it.

But now coming to the point of this discussion, I think you will all agree with me that a large proportion of the delays and the uncertainties in the administration of justice are attributable to our jury trials. We have great delays, first, in the selection of the jury, owing to the tests which I mentioned.

Second: In the discussion before the court of the admissibility of evidence and in the taking of exceptions to the rulings of the court upon these questions.

Third: Upon the instructions to be given by the court to the jury.

So many are the rules governing these questions and so difficult of application, it is almost impossible for any judge to avoid error in the conduct of a trial of any length or importance, and if any error is found in his rulings in any of these particulars it is cause for a reversal of the decision and the ordering of a new trial by the Court of Appeals. If the jury is allowed to separate, or if they are known to have talked with either of the parties, or transgressed any of the stringent rules governing their conduct, after they are impaneled, it is cause for a new trial. If the jury renders a verdict which the judge believes to be contrary to the law or the evidence, he is obliged to set it aside and grant a new trial. Now all these difficulties and delays are not caused by any fault of the judge, because he is bound to administer the law in accordance with the practice that has grown up from past ages. It is not, I think we may say, the fault of the jury, because it is not given a free hand in the decision of the case. It is so hedged in by the superintendence and guidance and instructions and rulings of the court that it is not surprising that it gets a wrong conception of its duty. The trouble arises from our conception and treatment of the jury, or perhaps, going deeper, from the fact that we think it necessary to have such a complex tribunal for the trial of causes.

What then is the remedy? Shall we retain the judge and the jury, but put the jury upon the same plane of confidence

that we put the judge? Shall we allow the jury, along with the judge, to determine its own competency to sit in any particular case? Shall we allow the jury, along with the judge, to pass upon what evidence it will hear and consider? And shall we then have only the question at the end of the trial as to whether there was sufficient legal evidence to sustain the conclusion arrived at? Is this possible? Shall we leave the law to be argued before the jury by counsel and decided by the jury along with the judge?

Shall not the judge take part in the deliberations of the jury and give them his views both upon the law and the evidence, and thus really give them the benefit of his knowledge of the law and of his experience in weighing and sifting evidence?

In other words, shall we make the judge a part of the jury—its presiding officer—with possibly the casting vote, as is the case in most tribunals, and have a real trial in all respects by the jury?

I am informed that in England a trial by jury has been largely done away with in civil cases. There are comparatively few classes of cases that are tried there now by juries. I think we will have to come to that in this country. There are a certain class of civil cases in which the right of trial by jury should probably be preserved, and in all criminal cases perhaps it should be preserved. But if we could dispense with the jury trial in all but a comparatively few civil cases, and then let the jury be placed upon the same footing in the public confidence and have the same treatment as our judges, isn't it possible that we would thereby eliminate a great many of the uncertainties and much of the delay in the administration of justice now complained of?

In conclusion, let me say that it is not with any great confidence that I suggest a remedy for these evils, as above outlined, but I am thoroughly convinced that the causes of the delays and uncertainties in the administration of justice are largely due to our conception and treatment of the jury trial, and that until we change our conception of such a trial and treat our juries differently, these evils will continue no matter what system may be adopted.

GEORGE E. PRICE.

Charleston, W. Va.

TRUSTS—RESERVING INCOME TO GRANTOR.

CITIZENS' NAT. BANK v. WATKINS et al.

Supreme Court of Tennessee. Oct. 21, 1912.

150 S. W. 96.

Defendant, being possessed of the legal title and beneficial use of certain property, conveyed the same to his brother, in trust to keep the property in repair, collect the rents, pay taxes and insurance, and to pay the remainder of the income to defendant during his life, and at his death to convey the property to the grantor's daughter in fee if living, and if not then imposing certain other duties on the trustee and his successor. Held, that such deed evidenced on its face an illegal scheme to hinder and delay creditors and was invalid as to them.

LANSDEN, J. The complainant is the owner of the defendant's note in the sum of $525.25, and filed this bill in the chancery court of Hamilton county, praying for judgment upon the note, and assailing a certain conveyance made by the defendant to his brother, as trustee, upon trust for the donor himself, as fraudulent and void, as hindering and delaying creditors. The conveyance assailed provides as follows:

"To keep said property in repair and collect, or have collected, all rents arising from said property, and to pay all taxes legally assessed against same, and to keep insured, if in the discretion of the trustee it should be done, and to such amount as the trustee deems necessary, the above expenses to be paid out of the income, likewise all other legitimate expenses arising from said trust, and the remainder of the income of every kind arising from said property the trustee will pay over to A. J. Watkins during his lifetime, it being my (A. J. Watkins') intention to retain all the net income after the expenses are paid during my natural life (the property hereby conveyed being absolutely my own). And at my death the trustee will convey the property to my daughter, Helen R. Watkins, in fee simple, if she has at that time reached the age of 21 years, free from the debts, contracts, control, or obligation or any marital

rights of her husband at that time, if she be married, or any future husband that the said Helen R. Watkins may have. If, not, said trustee will hold such property until she does arrive at the age of 21 years, and then convey to her in fee simple as above described.

"In case of the death or resignation or inability of the said trustee during the existence of this trust, then my mother. Helen Watkins, shall succeed Chester Watkins as trustee, and have power as here is invested in the original trustee, and continue the trust as aforesaid. If, during the existence of said trust, it shall be deemed best by the trustee or his successor in trust, said trustee or his successors in trust may at will sell any portion or all of said real estate for investment, or for any other purpose deemed necessary, by said trustee, and the same may be done by said trustee, and a good title vested in the purchaser, provided I join in the deed of conveyance. In the event of the death of Helen R. Watkins, the beneficiary herein named, she dying without issue during the lifetime of the said A. J. Watkins, the trustee will reconvey all of the above-described property to said A. J. Watkins in fee simple; but if said A. J. Watkins is dead at that time, the aforesaid trustee will convey said real estate in fee simple to my brothers, R. M. and Chester Watkins."

The answer of the defendant denied the fraud charged in the bill, and set up and relied upon the validity of the deed of trust. There is no proof in the record to support the charges of fraud made in the bill, other than the deed itself.

It is insisted for the defendant that the trust created by the deed in controversy is an active one, imposing certain specific duties upon the trustee, such as keeping the property in repair, collecting rents, paying taxes and insurance, and at the death of the grantor to convey the property to his daughter if living, and if not living then imposing certain other active duties upon the trustee or his successor in respect of the property.

It is argued from this that the complainant, being a subsequent creditor at large, is entitled to no relief, upon the authority of McKeldin v. Gouldy, 91 Tenn. 677, 20 S. W. 231.

(1-4) Whether this is true depends upon the legal effect to be given to the deed of trust. If the deed is valid, the trust created is an active one. Henson v. Wright, 88 Tenn. 501, 12 S. W. 1035; Jourolmon v. Massengill, 86 Tenn. 81, 5 S. W. 719. In such trusts the estate of the cestui que trust is a permanent equitable estate, and the complainant's remedy is properly set forth in McKeldrin v. Gouldy, supra. But if the deed of trust is a fraudulent conveyance of the property, or merely a device resorted to for the purpose of hindering and delaying creditors, a creditor at large may file his bill in the chancery court and subject the property to the satisfaction of his debt. Shannon's Code, § 6097; Brooks v. Gibson, 7 Lea, 271; August v. Seeskind, 6 Cold, 166. This particular class of spendthrift trusts has evoked an expression of opinion from the courts of last resort of the various states where the doctrine of spendthrift trusts is recognized, which seems to be unanimous, and in all of them which have fallen under our observation a deed executed by the donor to a trustee to secure to himself the benefits of the property conveyed is absolutely void as against both existing and subsequent creditors. The general policy of the law is that creditors have the right to resort to all the property of the debtor for the satisfaction of their debts, except so far as the debtor is given specific exemption by the statutes of the state; and by our Shannon's Code, § 6097, conveyances for the purpose of hindering and delaying creditors are declared void. In Menkin v. Brinkley, 94 Tenn. 721, 31 S. W. 92, it was stated generally that where the owner of property conveyed it in trust, making himself the cestui que trust, that such conveyance was void. However, in that case, the complainants were judgment creditors with nulla bona return, and the question of procedure presented upon the assignments of error in this case was not considered. The general doctrine stated in Menkin v. Brinkley, supra, has been repeatedly announced by the various courts of the Union. In Nolan v. Nolan, 218 Pa. 135, 67 Atl. 52, 12 L. R. A. (N. S.) 369, it was said:

"It is against public policy, and not consonant with natural justice and fair dealing as between debtor and creditor, that a settlor should be permitted to play fast and loose with his property in such a manner as to have the use of the income during life and the right of disposing of the principal by will at any subsequent time he chooses to exercise the power, thus giving him all of the substantial benefits arising from the ownership thereof, while he has safely put his property beyond the reach of creditors." Sargent v. Burdett, 96 Ga. 111, 22 S. E. 667; Petty v. Moores Brooks Sanitarium, 110 Va. 815 67 S. E. 355, 27 L. R. A. (N. S.) 800, 19 Ann. Cas. 271.

From the nature of the deed of trust in

question we are of the opinion that its legal effect amounts to nothing more than a scheme to hinder and delay creditors in the collection of their debts. No other proof of the scheme is required than the terms of the instrument itself. The defendant was already possessed of an estate in the property of his own right, holding the legal title and the beneficial use, and the only benefit which he could acquire by the conveyance to his brother in trust for himself would be to hinder and delay creditors in the collection of their debts. He cannot own the property and not own it at the same time. Whatever might be said of the justice or honesty of the arrangement in point of morals, it is enough that such conveyance contravenes a sound public policy announced in Menkin v. Brinkley, supra, and is therefore void. Being void, it may be reached by the bill in this case, upon an allegation that the conveyance is fraudulent and was made for the purpose of hindering and delaying creditors, without any further proof of the fraudulent arrangement than the instrument itself. Its inevitable effect is to hinder and delay creditors, and the maker must be conclusively presumed to have so intended.

The Court of Civil Appeals reached the same conclusion, but upon different grounds, and its decree is affirmed, with costs.

NOTE.—*Liability of Trust Created by Settlor for His Benefit to Subsequent Creditors.*—The instant case shows the very definite creation of a remainder and yet the entire conveyance is set aside at the suit of a subsequent creditor. We think the cases do not support such a ruling, and we refer both to those it cites and to others.

The case of Nolan v. Nolan, 218 Pa. 135, 67 Atl. 52, 12 L. R. A. (N. S.) 369, which the instant case cites for authority, seems not wholly to resemble it. In the instant case there was a vested remainder. In the cited case there was not. In other words neither the principal nor income was conveyed away in the one case, while in the latter the principal was conveyed, subject to a life estate in the income. In the opinion in the cited case the case of Pacific Nat. Bank v. Windram, 133 Mass. 175, was referred to as holding that where a man transfers a trust fund with the income to be paid to him during life and the principal at his death to be paid to others, the principal may be beyond the reach of future creditors, but it was said the only question decided was that the income was liable for his debts.

Further on in discussing the validity *rel non* of the conveyance before the court it was said: "As against existing creditors such a conveyance (one merely reserving a life estate in income) would be fraudulent, and in order to make it valid as to subsequent creditors, it must appear that the settlor has divested himself of all rights of ownership in, and control over, the property thus conveyed, reserving only to himself the right to receive the income during life; and it must also appear that no other act on his part is required to be done to complete the title in, or make a transfer of the ownership to, the beneficiaries who are entitled to take the same under the terms and conditions of the conveyance. Even in such case the income would be considered assets subject to attachment by a creditor of the settlor." The deed in the instant case seems to fulfill every condition above stated.

In Scott v. Keane, 87 Md. 709, 40 Atl. 1070, 42 L. R. A. 359, invalidity as to subsequent creditors seems to have been predicated entirely upon the reserved right of the settlor to dispose of the corpus by deed or will, with the property to descend to his heirs at law for failure of disposition.

In Sargent v. Burdett, 96 Ga. 111, 22 S. E. 667, also cited by the instant case, there was a reserved right of the settlor to dispose of the principal during his life.

There are cases directly to the effect that if there is no reservation of disposal by deed or will the income merely is subject to the claims of creditors. Thus in Brown v. MacGill, 87 Md. 161, 39 L. R. A. 806, 67 Am. St. 334, 39 Atl. 613, the deed reserved the income for life and provided for final disposition of the corpus at settlor's death. It was held fraudulent and void only in so far as it attempted to place the income beyond the reach of subsequent creditors.

In Schenck v. Barnes, 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395, there was a vested remainder under the terms of the deed and the income only was declared subject to the debts of subsequent creditors. See also Low v. Carter, 21 N. H. 33; De Hierapolis v. Lawrence, 115 Fed. 761.

The U. S. Supreme Court has even gone to the extent of holding that the mere power of revocation and appointment being reserved will not make an estate conveyed subject to subsequent creditors if an interest is by the conveyance actually vested. Jones v. Clifton, 101 U. S. 225.

The instant case might have referred to a later case in Pennsylvania than that of Nolan v. Nolan, *supra*; Estate of Morgan, 223 Pa. 228, 72 Atl. 408, 25 L. R. A. (N. S.) 236. There it would have discovered that the entire real and personal property devised in trust to hold for three years for a designated person and then to convey same to whomsoever he should designate was invalid as a spendthrift trust, because his control over it virtually made it his property and therefore subject to his debts, both existing and subsequent. It was said this right of control by the beneficiary "strips the trust of every active duty and of every right of control beyond the pleasure of the donee." We know the testator could have made this principal free from donees' debts, but if the property was the same as vested in him absolutely it must be subject to his creditors' claims.

In Petty v. Moores Brooks Sanitarium, 110 Va. 815, 67 S. E. 355, 27 L. R. A. (N. S.) 800, 19 Ann. Cas. 371, the point in decision was whether a spendthrift trust, created by the spendthrift, was immune from subsequent creditors, where the trustee was vested with absolute discretion as to what part of the income should be paid to the settlor, the said settlor having reserved the power of appointment by will. The court thought it not important, that the trustee should have the determination of how much was to be paid out

of the income to the settlor, and this is all that was determined and the fact that there was retained the power of appointment by will was not dwelt upon.

In Menkin v. Bradley, 94 Tenn. 721, 31 S. W. 92, the deed reserved "the power to appoint by will," and in the opinion it was said: "This seems to us conclusive that no remainder interest was created or intended to be created; and, even if there were a remainder, the rents and profits, or the property during Brinkley's life, could be subjected to his debts."

Therefore it would seem clear that the decision in the instant case and upon the very cases it cites, is error in so far as it holds the entire property, rather than a life estate therein only, subject to the debts of subsequent creditors.

C.

CORRESPONDENCE.

THE NEW EQUITY RULES—A REFLECTION.

Editor Central Law Journal:

When it is reflected how much learning is consigned to oblivion by the new Equity Rules, one can scarcely restrain the feeling expressed by Kent—himself not now often referred to—on the abolition in New York of the Rule in Shelley's Case:

"The juridical scholar, on whom his great master, Coke, has bestowed some portion of the 'gladsome light of jurisprudence,' will scarcely be able to withhold an involuntary sigh, as he casts a retrospective glance over the piles of learning devoted to destruction by an edict as sweeping and unrelenting as the torch of Omar. He must bid adieu forever to the renowned discussions in Shelley's case, which were so vehement and so protracted as to rouse the scepter of the haughty Elizabeth. He may equally take leave of the multiplied specimens of profound logic, skillful criticism, and refined distinctions, which pervade the varied cases in law and equity, from those of Shelley and Archer, down to the direct collision between the courts of law and equity, in the time of Lord Hardwicke. He will have no more concern with the powerful and animated discussions in Perrin v. Blake, which awakened all that was noble and illustrious in talent and endowment, through every precinct of Westminster Hall. He will have occasion no longer, in pursuit of the learning of that case, to tread the clear and bright paths illuminated by Sir William Blackstone's illustrations, or to study and admire the spirited and ingenious dissertation of Hargrave, the comprehensive and profound disquisition of Fearne, the acute and analytical essay of Preston, the neat and orderly abridgement of Cruise, and the severe and piercing criticisms of Reeves. What I have, therefore, written on this subject, may be considered, so far as my native state is concerned, as a humble monument to the memory of departed learning."

H. RIDDELL.

Denver, Colo.

[Let us ask if it is learning or jargon that is renounced? Feudal scholasticism paddied jurisprudence with a learned verbosity that has delayed its course at least 300 years and just as Bacon predicted, we have had to get away from Coke's "Case System," wherein his Shelley's Case was a notable one. This case stands in opposition to the Roman maxim, "ut res magis valiat quam pereat." This maxim is applicable to all documents, and, of course, the deed, as was held in Roe v. Tranmarr, Smith's Leading Cases.

The struggle between courts of law and of equity has raged furiously for 300 years. But Shelley's Case is gone; and the definitions of equity by Coke and Blackstone must be swept away; also their maxims bounding equity-jurisdiction which may justly be attributable to Coke; these must likewise go. As is shown in Hughes' Equity in Procedure, the maxims of equity are the organic principles of jurisprudence. But this was never suggested by either Coke or Blackstone. Indeed, the latter confessed to know nothing of equity, of which Bacon knew so much, and for which he did so much. There are immutable organic principles of law and of procedure that were not comprehended by feudal authors, but who nevertheless injected their views into every artery and vein of government and, of course, throughout all that relates to the judicial department. The introduction and development of the Civil Law has crowded out Shelley's Case, which has been given entirely too much attention.

And now, and at last, the great tribunal of the Western Rome, is overhauling the ways and the ideas of feudalism and the combatants of the Reformation and are giving to an expectant and awaiting nation the spirit and methods of that law which Bacon sought to give, but could not. He sought to give unification, simplification and expedition; and this was the effort of David Dudley Field, whose code has been construed everything, every way, from every angle for everybody. Only the jurists of this country can give good government and it is very gratifying and assuring to know that the Supreme Court of the United States has set about a task that has too long awaited them.—Ed.]

BOOK REVIEWS.

FEDERAL EMPLOYERS' LIABILITY AND SAFETY APPLIANCE ACTS—SECOND EDITION.

This work is by Mr. W. W. Thornton of the Indianapolis Bar and comes three years after the first edition was issued. At that time the liability statute was less than a year old, and the only decision then extant was upon the provisions of the unconstitutional act of 1906. In the meantime a number of courts have construed many parts of the 1908 Act, but there are many questions yet to be settled. The author says it is yet to be settled whether an interstate employee must bring his action under this instead of under a state statute.

The Safety Appliance Act has, of course, received more extensive consideration in decision because of its greater age.

State statutes abolishing the defense of contributory negligence are collected in an appendix.

The author of this work has considered the liability act in Eight Chapters in which are treated Abolition of Fellow Servant Rule, Constitutionality and Effect on State Legislation, the Railroads embraced, the employees embraced, contributory negligence and Assumption of Risk, Death by Wrongful Act, Release of Claim for Damages and Courts in which suit may be brought, all as perceived vital questions.

Safety Appliance Acts are considered in six chapters and Hours of Labor statute in one chapter, and to all of these chapters annotation in decision comes to the date of the book's completion in February, 1912.

There are a number of appendices giving statutes to which the text refers, Senate reports and some opinions rendered by courts and state statutes as above said.

The work is a very useful publication and the annotation made is especially full, many excerpts from opinions being embraced. The treatment is logical in arrangement and such as makes the work readily usable by practitioners.

The volume is bound in buckram, of generally excellent make-up and is published by The W. H. Anderson Co., Cincinnati, 1912.

STREET RAILWAY REPORTS, VOL. 7.

This series includes annotated decisions by federal and state courts of electric railway and street railway cases. The volume and page of the reporter system is given of the cases reported and the notes give citations as to wherever the cases referred to in notes are found.

With this volume comes a combined index to notes in volumes 1 to 7 inclusive, the volumes being edited by Austin B. Griffin of the Albany and Arthur F. Curtis of the Delhi, N. Y., bars.

The annotation to some of the cases is quite extensive and to each case there is a note. As a collection of cases of the kind the series undertakes to report and the notes thereon the series should be valuable to practitioners. The volumes are bound in buckram, of good typography and paper and are published by the Matthew Bender Company, Albany, N. Y.; this volume 7 being of 1912.

BLACK'S LAW OF JUDICIAL PRECEDENTS

This work, by Mr. Henry C. Black of Washington, D. C., is a very studious, creditable effort to formulate rules as to a subject not easy to gather within well-defined lines. To say that a particular question is settled may sometimes be easy. To say that another is may be open to dispute.

The ratio decidendi so often, or, as may be said, generally, appears in the opinion of one member of a court, when a conclusion concurred in may be along different lines. Then the facts of a case may not sufficiently appear and distinctions suggested or foreclosed.

Then so much in decision is on statutory phraseology, that is not greatly valuable. Indeed, what may not be said to come up to the requirement of a rule of property is learned dissertation, which the bent of other minds or their environment may color and shade in reasoning and philosophizing about, until it becomes hard to say where theorizing ends and precedent stands.

It may be said herein is that healthful development that ought to be found. Indeed, what is the common sense of law is its responsiveness to that development.

Prof. Black, however, gives an admirable book. It helps to fix precedent in its place or places, though there may not exist so many places as he formulates in his rules, and if there is any criticism we might indulge in as to an enthusiast for precedent, it would be to assail the interference the federal court interposes in states establishing, if they can, binding precedents as to everything not of a purely federal nature. To see them merely laboring in deciding cases, as they please, when courts with jurisdiction over subject matter are trying to establish precedents is not wholly beseeming in the law.

This book, in a single volume of nearly 800 pages, is bound in law buckram and comes from West Publishing Company, St. Paul, 1912.

A CORRECTION.

The contribution by Henry M. Earle, of New York City, entitled "The Public and the Courts," appearing on page 62, volume 75, should not have been published under correspondence. The observations there made was an excerpt from a public address which Mr. Earle sent us some time last summer.

HUMOR OF THE LAW.

Having been cautioned by the prosecuting attorney not to let the counsel for defendant trick him into altering his testimony, the old negro on the witness stand braced himself grimly for the ordeal of cross-examination. He had just detailed on direct examination how he had seen the prisoner murder his victim, throw away his razor, and flee from the scene.

"You say you saw this man drop his razor and run away?" demanded counsel for defendant in challenging tone.

"No, suh, Ah nevah said dat," declared the witness.

The attorney consulted his notes a moment, then turned fiercely on the witness again.

"Do you mean to tell this court and jury," he thundered, "that you did not say a few minutes ago that you saw this defendant throw down his razor and run away?"

"No, sur, Ah nevah did," insisted the old man stubbornly. "An' no lawyah can make me say somethin' Ah knows I didn't say."

"Well, what did you say?" demanded the exasperated counsel.

"Ah nevah said Ah saw him," responded the old darkey slowly, with dignity. "Ah said Ah seen him!"

XUM

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Assignments**—Equity.—An assignment of a mere possibility, such as that of an heir in the estate of his living ancestor, is good in equity, as is one of a vested interest in property to come into existence in the future.—Bridge v. Kedon, Cal., 126 Pac. 149.

2. **Attachment**—Liens.—Where property attached was in the hands of a third person subject to liens, the sheriff, in making the attachment, could not take the property out of the hands of the lienor.—Lindsey v. Mexican Crude Rubber Co., U. S. D. C., 197 Fed. 775.

3. **Attorney and Client**—Compensation.—An attorney, who comprises his client's case against the latter's express direction, is not entitled to compensation for his services.—Rogers v. Pettigrew, Ga., 75 S. E. 631.

4. **Bankruptcy**—Creditors.—Ordinarily a general creditor may not prosecute before a referee a motion for reconsideration of the allowed claim of another creditor.—In re Mexico Hardware Co., U. S. D. C., 197 Fed. 650.

5.——Disallowance of Claim.—Where a claim has been properly disallowed on objections made and conducted by the creditors in their own names, the order of disallowance will not be disturbed on theory that the trustee was the only proper person to attack the claim.—In re Canton Iron & Steel Co., U. S. D. C., 197 Fed. 767.

6.——Discharge.—Specifications of objection to a bankrupt's discharge in the general language of the statute are subject to a motion to make more specific, if made before the case is called for trial.—In re Mintzer, U. S. D. C., 197 Fed. 647.

7.——Evidence.—In determining the question of the solvency of a bankrupt, who conducted and owned the furniture in a hotel, at the time he executed a mortgage to a creditor claimed to be preferential, his property must be valued as that of a going concern, and not at what it was worth as dead property after bankruptcy had intervened.—In re Klein, C. C. A., 197 Fed. 241.

8.——Evidence.—Statements made by a bankrupt on his examination as to the ownership of property in his possession held admissible against his trustee in proceedings by an adverse claimant to reclaim the property.—In re Thompson, U. S. D. C., 197 Fed. 681.

9.——Exemptions.—A debt, unsecured by a lien, provable in bankruptcy, and not within any of the exceptions specified in the bankruptcy act, was not enforceable in equity by a proceeding in rem against exempt property set apart to the bankrupt in such proceedings, as against a plea of discharge and notice of the proceedings.—Richards v. Shields, Ga., 75 S. E. 602.

10.——Jurisdiction.—A court of bankruptcy has jurisdiction on petition of a receiver before adjudication to inquire summarily into the status of property alleged to belong to the bankrupt, and if found to be in fact in his possession, although apparently in that of another, to summarily order it turned over to the receiver.—In re Franklin Suit & Skirt Co., U. S. D. C., 197 Fed. 591.

11.——Practice.—A federal court in bankruptcy may in its discretion permit lien claimants of the bankrupt to enforce their liens in state courts, and modify an order permitting such suits, provided the lien claimants are not deprived of any right to which they are entitled in the bankruptcy proceeding.—Virginia Iron, Coal & Coke Co. v. Olcott, C. C. A., 197 Fed. 730.

12.——Preference.—A debtor, who transfers his property to a creditor by voluntarily confessing judgment in favor of the creditor and allowing him to issue execution and make a levy and a sale resulting in the creditor becoming the purchaser, transfers his property within Bankruptcy Act.—Grant v. National Bank of Auburn, U. S. D. C., 197 Fed. 581.

13.——Solvency.—A solvent debtor who mortgages his stock in trade to secure his debt, and who permits his secured creditor to obtain a legal preference, does not commit acts of bankruptcy.—Johansen Bros. Shoe Co. v. Alles, C. C. A., 197 Fed. 274.

14. **Banks and Banking**—Collections.—One who chooses a bank as a collecting agent impliedly agrees that the agency may be performed in accordance with reasonable methods which have ripened into usage, though he has no actual knowledge of their existence.—Hillsinger v. Trickett, Ohio, 99 N. E. 305.

15. **Bills and Notes**—Consideration.—Extension of time to make a payment on a purchase, it having been stipulated that failure to make it at the time first provided should forfeit as liquidated damages all payments made, is sufficient consideration for a note for the amount to be paid.—Joseph E. Thomas & Co. v. Hillis, Wash., 126 Pac. 62.

16.——Equitable Defense.—It is an equitable defense, of which indorsers of a note as sureties, sued thereon jointly with the maker, and

with him jointly and severally liable thereon, may avail themselves, that the maker has a counterclaim for breach of the contract inducing the giving of the note, especially where he by separate answer is asserting it for his own benefit.—Iroquois Door Co. v. Leavenworth Apartment Co., 137 N. Y. Supp. 122.

17.——Holder.—Where payees before maturity of a note indorsed a warranty that the makers were financially good on execution and signed their names, the indorsement transferred title and protected the transferee, who was a bona fide purchaser, against any defenses which the maker might have against the payees other than those allowed by statute.—Hendrix v. Bauhard Bros., Ga., 75 S. E. 588.

18.——Law of Place.—The negotiability of a note is determined by the law of the place where it was made.—Navajo County Bank v. Dolson, Cal., 126 Pac. 153.

19.——Notice.—A receiver of an insolvent bank, knowing the fiduciary relation existing between an officer of the bank and the maker of notes, payable to the receiver, is chargeable with notice of fraud by the bank officer upon the maker.—Brown v. Miller, Idaho, 125 Pac. 981.

20.——Unconditional Delivery.—A note, as between the parties, takes effect only on its unconditional delivery.—Young v. Hayes, Mass., 99 N. E. 327.

21. **Boundaries**—Dividing Line.—Where the owners of adjoining lands occupy their respective premises up to a certain line which they mutually recognize as the boundary line for a long period of time, they and their grantees may not deny that the boundary thus recognized is the true one.—Binford v. Eccles, Utah, 126 Pac. 333.

22. **Brokers**—Contract.—A brokerage contract based on a consideration for the sale of a definite number of fruit jars in a specified territory held not terminable at defendant's will.—Hollweg v. Schaefer Brokerage Co., C. C. A., 197 Fed. 689.

23. **Carriers of Goods**—Regulations.—Violation of Interstate Commerce Act, § 10, prohibiting false billing, false classification, false weighing, or misrepresentations as to the contents of a package, by which a discrimination is obtained, constitutes no defense to a carrier's liability for loss of goods shipped in interstate commerce, resulting from a violation of its duties as a carrier.—Adams Express Co. v. Chamberlin-Johnson-Du Bose Co., Ga., 75 S. E. 601.

24.——Shippers.—When a shipper has done all in his power, and all that he is required to do by his understanding with the carrier or usages of the business to further the shipment, it then becomes the carrier's duty to do whatever else is necessary to put the goods in transit, and delivery to and acceptance by the carrier will be deemed complete from the time the carrier is advised that the goods are ready for it.—Colorado & S. Ry. Co. v. Breniman, Colo., 125 Pac. 855.

25. **Carriers of Live Stock**—Burden of Proof.—Where a live stock bill of lading required notice of damage before stock was removed or mingled with other stock, the burden was on plaintiff, in an action thereunder, to show that the notice was given within the time provided.—Chicago, R. I. & P. Ry. Co. v. Conway, Okla., 125 Pac. 1110.

26. **Carriers of Passengers**—Agents.—Where a ticket agent by mistake gives the passenger the wrong ticket, the carrier by whose agent the ticket is sold is bound by the real contract between the parties.—Pullman Co. v. Riley, Ala., 59 So. 761.

27.——Assumption of Risk.—A passenger on an open street car, who voluntarily rides standing between two seats, assumes the manifest inconveniences and risks incident to proper operation of the car; but in so riding he is not guilty of such contributory negligence as prevents recovery for injury resulting from negligent operation of the car.—Kebbee v. Connecticut Co., Conn., 84 Atl. 329.

28.——Sleeping Cars.—A sleeping car company is a public service corporation and is liable in damages for breach of its duties to a member of the public which it is bound to serve.—Pullman Co. v. Riley, Ala., 59 So. 761.

29. **Chattel Mortgages**—Attorney Fees.—Under a chattel mortgage providing that on default the mortgagee might seize and sell the property and apply the proceeds, after deducting all expenses and charges, including attorney's fees, to the payment of the indebtedness, etc., he is not entitled to an attorney's fee in foreclosure by action.—Brown v. Kolb, S. Car., 75 S. E. 529.

30. **Commerce**—Employer's Liability Act.—An employee of a railroad company engaged in interstate commerce killed in a collision while riding to his home by permission on one of the company's trains held not employed in interstate commerce within the meaning of Employer's Liability Act.—Bennett v. Lehigh Valley R. Co., U. S. D. C., 197 Fed. 578.

31.——Employer's Liability Act.—Employees of a railroad company engaged in hauling freight from some intermediate point on its line to another point, where it is taken up by regular trains for interstate shipment, are employed in interstate commerce within the meaning of Act March 4, 1907, § 2, regulating the hours of service of employees.—United States v. Chicago, M. & P. S. Ry. Co., U. S. D. C., 197 Fed. 624.

32.——Employer's Liability Act.—The federal Employer's Liability Act April 22, 1908, applies only to injuries suffered by employees while the carrier is engaged in an act of interstate transportation, and to such employees only as at the time of injury have a real and substantial connection with such act of interstate transportation.—Pedersen v. Delaware, L. & W. R. Co., C. C. A., 197 Fed. 537.

33. **Compromise and Settlement**—Consideration.—Actual malice not being an ingredient of a real estate transaction under which plaintiff defrauded defendants, there was no such basis for recovery by defendants against plaintiff of exemplary damages as to constitute a valid consideration for a contract of compromise, into which plaintiff was coerced through duress.—McNair v. Benson, Ore., 126 Pac. 20.

34.——Duress.—A party to a settlement cannot avoid the same on the ground of duress, where he does not offer to return the benefits received.—Drew v. Bouffleur, Wash., 125 Pac. 947.

35. **Contempt**—Civil Contempt.—Willful disobedience of an order in a civil action is not

criminal contempt; in such a case the punishment is only ordered to enforce the prior order.—Flathers v. State, Okla., 125 Pac. 902.

36. **Contracts**—Building.—Where there is a conflict between a building contract and the specifications, the former prevails.—Cruthers v. Donahoe, Conn., 84 Atl. 322.

37.——Consideration.—A written contract carries with it the presumption of a consideration; and the burden of showing want of consideration is on him who seeks to avoid it.—Cuthill v. Peabody, Cal., 125 Pac. 926.

38.——Law Governing.—Ordinarily the place where a contract is made depends, not upon the place where it is written, signed, or dated, but where it is delivered as consummating the bargain.—Navajo County Bank v. Dolson, Cal., 126 Pac. 153.

39. **Corporations**—Common Manager.—Where two corporations had a common managing director, a proposed sale of the assets of one of them to the other was subject to injunction at the instance of minority stockholders of the selling company until it was proved that the transaction was fair and free from fraud.—Geddes v. Anaconda Copper Mining Co., U. S. D. C., 197 Fed. 860.

40.——Estoppel.—Stockholders with whose knowledge and acquiescence the corporation borrows money, and uses it for paying for its property, are estopped to question the validity of the mortgage given by it as security.—Larkin v. Hagan, Ariz., 126 Pac. 268.

41.——Promoters.—A contract made by promoters, as trustees, for the building of a steamship, which they turned over to the corporation on its organization, making a secret profit thereon, was made in trust for the corporation, and the corporation on discovery of the fraud held entitled to maintain a suit in equity to rescind the contract; the shipbuilding company having full knowledge of the situation.—Commonwealth S. S. Co. v. American Shipbuilding Co., U. S. D. C., 197 Fed. 797.

42. **Criminal Law**—Corroboration.—In a prosecution for the sale of liquor asserted to have been made by defendant's wife, defendant's failure to place her upon the witness stand, or to account for such failure, will be corroborative of the state's testimony.—Tucker v. State, Okla., 125 Pac. 1089.

43.——Cruel Punishment.—Rem. & Bal. Code, § 2287 authorizing the court to direct vasectomy on conviction of statutory rape, is not invalid, as authorizing cruel punishment, in violation of Const. art. 1, § 14.—State v. Feilen, Wash., 126 Pac. 75.

44.——Evidence.—In a prosecution for using the mails to defraud, the admission of evidence that defendant was also conducting another similar scheme not mentioned in the indictments held error.—Marshall v. United States, C. C. A., 197 Fed. 511.

45. **Criminal Trial**—Preliminary Trial.—It is not necessary for the committing magistrate to be convinced beyond a reasonable doubt that one accused of crime is guilty; but if he has reasonable or probable cause to believe, and does believe, he is guilty he should be held for trial.—State v. Layman, Idaho, 125 Pac. 1042.

46. **Damages**—Proximate Cause.—A woman, negligently thrown from defendant's street car, can recover for suffering caused by a miscarriage produced by the accident a few days thereafter.—Raynor v. Tacoma Ry. & Power Co., Wash., 126 Pac. 91.

47.——Special Damages.—Special damages are not recoverable for breach of contract, unless both parties knew of the special circumstances at the time of contract.—Western Union Telegraph Co. v. Albertville Canning Co., Ala., 59 So. 755.

48. **Death**—Employer's Liability Act.—Where a brakeman engaged in interstate commerce was injured, his right of action, under Second Employer's Liability Act, for suffering before he died, did not survive to his parents, but a new cause of action for wrongful death was created in their favor.—Garrett v. Louisville & N. R. Co., C. C. A., 197 Fed. 715.

49. **Deeds**—Duress.—Complainant held not entitled to have a deed set aside for duress, because she feared foreclosure of a mortgage might cause her to lose her home, and that injury might result therefrom to her daughter, who was then ill.—Drew v. Bouffleur, Wash., 125 Pac. 947.

50. **Divorce**—Community Property.—Where a divorce decree obtained by a husband made no division of the community property, the parties became tenants in common thereof, and the wife was thereafter entitled to sue for partition.—Hicks v. Hicks, Wash., 125 Pac. 945.

51. **Easements**—Deeds.—The extent of an easement is to be determined by the language of the deed, and, if that is ambiguous, by the situation of the property and the surrounding circumstances.—Lynch v. White, Conn., 84 Atl. 326.

52. **Embezzlement**—Demand.—To support a conviction of embezzlement, it need not be shown that after the fraudulent misappropriation of the money a demand was made on defendant.—People v. Hatch, Cal., 125 Pac. 907.

53. **Equity**—Laches.—A married woman is not barred by laches of her husband from maintaining a suit to set aside a foreclosure by mere delay, less than the period of limitations.—Pons v. Yazoo & M. V. R. Co., La., 59 So. 721.

54. **Fraud**—Reliance on Representations.—Purchaser of lands, not relying on the broker's agent's statements, but upon his own judgment as to its value, held to have no action against the broker for fraud.—Bradley v. Oviatt, Conn., 84 Atl. 321.

55. **Frauds, Statute of**—Oral Contract.—Where parties to an oral contract of employment for more than a year within the year modified and enlarged the contract orally, and plaintiff proceeded to perform, the contract was not within the statute of frauds as a matter of law—Hollweg v. Schaefer Brokerage Co., C. C. A., 197 Fed. 689.

56. **Garnishment**—Surety.—Where, after the filing of an affidavit for foreign attachment, plaintiff by amendment seeks to increase his claim for damages, the sureties are not discharged from all liability.—Commonwealth v. A. B. Baxter & Co., Pa., 84 Atl. 136.

57. **Guaranty**—Primary Liability.—Where a person executed a written guaranty on an order for goods before they were shipped, and subsequently, before delivery, wired a guaranty of the account, regardless of an old account of the buyer, on the seller's refusal to deliver, unless payment was made or guaranteed, he became liable primarily, and not merely as guar-

XUM

antor.—Hulme v. Levis-Zuloski Mercantile Co., Tex., 149 S. W. 781.

58.——Sureties.—The obligors on notes secured by a mortgage and controlled by a collateral, contemporaneous agreement, which made their liability contingent upon a deficiency decree being entered, were guarantors, and not sureties.—Gurley v. Robertson, Ala., 59 So. 643.

59. **Husband and Wife**—Antenuptial Contract.—Where an antenuptial conveyance provided that if the property was sold the proceeds should belong to the wife, and after the marriage the property was sold and the proceeds invested in other realty, title to which was taken jointly, held, that the wife was not entitled to enforce the antenuptial contract.—Cantrell v. Cantrell, Ala., 59 So. 652.

60.——Domicile.—Personal property acquired during coverture is controlled by the law of the matrimonial domicile, and, if the title thereto was vested in the husband, it will be presumed everywhere to be his property, and the same is true of the separate property of the wife.—Douglas v. Douglas, Idaho, 125 Pac. 796.

61.——Wife's Property.—Ordinarily a husband may recover his wife's personal property unlawfully detained.—McNeil v. Williams, Fla., 59 So. 562.

62. **Infants**—Guardian ad Litem.—The appointment of a guardian ad litem for nonresident infant defendants is a nullity, where made before service of process upon them was complete.—Ford v. Clendenin, 137 N. Y. Supp. 54.

63. **Injunction**—Public Officers.—Injunction does not lie to compel public officers to perform their duties respecting enforcement of the criminal law, nor to prevent commission of crime.—Green v. Piper, N. J., 84 Atl. 194.

64.——Violation.—An injunction may be violated by indirect, as well as by direct, methods; and one may not escape punishment on the ground that he did not violate the letter of the injunction, provided he violated its manifest spirit.—Deming v. Bradstreet, Conn., 84 Atl. 116.

65.——Violation of Ordinance.—Injunction is not an appropriate remedy available to a village to restrain violations of a general ordinance.—Higgins v. Lacroix, Minn., 137 N. W. 417.

66. **Insurance**—Foreign Corporations.—A state may exact any stipulation it pleases as a condition to the admission of foreign insurance companies to do business in the state.—City of Montgomery v. Royal Exchange Assur. Corporation of England, Ala., 59 So. 508.

67.——Reformation of Policy.—If contracting parties to insurance policy make a mistake in the name of insured ,equity has jurisdiction to correct the mistake.—Dearborn v. Niagara Fire Ins. Co. of City of New York, N. M., 125 Pac. 606.

68.——Subrogation.—Where fire insurers who paying less than the amount of the total loss negligently caused by a railway company are subrogated pro tanto to insured's rights, they become equitable assignees; the assignment having the aspect, in effect, of one by the most formal and express deed.—Gaugler v. Chicago, M. & P. S. Ry. Co., U. S. D. C., 197 Fed. 79.

69.——Waiver.—An employer's liability insurance company by defending an action brought by an employee against an employer does not waive right to deny that the accident to the employee was within an exception to the policy, and therefore one for which it was not liable; it having been understood between it and the employer that it should defend with a full "reservation of policy rights."—Buffalo Steel Co. v. Aetna Life Ins. Co., 136 N. Y. Supp. 977.

70. **Libel and Slander**—Charge of Drunkenness.—Words spoken falsely, imputing drunkenness while on duty, and unfitness for duty, to a member of a district board of registry and election are actionable per se.—Reilly v. Curtiss, N. J., 84 Atl. 199.

71.——Privilege.—A creditors' meeting is an occasion of conditional, qualified privilege as affecting liability as for slander for statements made therein.—Smith Bros. & Co. v. W. C. Agee & Co., Ala., 59 So. 647.

72. **Life Estates**—Income.—What is "income" from capital stock, to which a life tenant is entitled under a will, as distinguished from "principal," to which the remainderman is entitled, depends largely on testator's presumed intention.—In re Bunker's Estate, 137 N. Y. Supp. 104.

73. **Limitation of Actions**—Starting Point.—Where the debtor's liability was contingent upon the entering of a decree, the statute of limitations did not begin to run against the claim until a decree was entered.—Gurley v. Robertson, Ala., 59 So. 643.

74. **Malicious Prosecution**—Attorney Fees.—In an action for malicious prosecution, plaintiff, if entitled to recover anything, may recover his reasonable attorney's fees incurred in defending himself against the malicious prosecution.—Hawkins v. Collins, Ala., 59 So. 694.

75. **Mandamus**—Publici Juris.—Where a question is publici juris, the Supreme Court will issue its prerogative writ of mandamus, on the relation of a private relator, though the Attorney General refuses to make or approve the application.—State v. Harmon, N. Dak., 137 N. W. 427.

76. **Marriage**—Status.—Marriage is not a contract, but is a status, defined and established by law, and the state assumes authority to control the rights and obligations of those who enter into the relation.—Cohen v. Cohen, Del., 84 Atl. 122.

77. **Master and Servant**—Rules and Regulations.—An employer should promulgate proper rules for his employees and business whenever his personal supervision is impracticable.—Warren v. Harlan & Hollingsworth Corporation, Del., 84 Atl. 215.

78. **Mechanics' Liens**—Enforcement.—Where lessees, with the consent of the owner, employed a contractor to make alterations in the leased premises at their own expense, according to specifications furnished by the owner's architect, one performing work and furnishing materials for the alterations could not enforce a lien against the owner.—Gorman v. Birrell, Utah, 125 Pac. 685.

79. **Mines and Minerals**—Partnership.—The chief distinction of a mining from a general partnership is the absence of delectus personae in the former and the resultant rules that the shares of mining partners may be transferred to others who become partners.—Daily v. Fitzgerald, N. M., 125 Pac. 625.

80. **Mortgages**—Attorney Fee.—A provision in a mortgage for the payment of a reasonable attorney's fee, in case it should be necessary to employ one in the collection of the debt, is a contract of indemnity in favor of the creditor, and entitles his attorney to reasonable compensation.—T. S. Faulk & Co. v. Hobbie Grocery Co., Ala., 59 So. 450.

81.——Caveat Emptor.—A purchaser at a foreclosure sale under a judicial decree assumes the risk of the regularity and validity of the proceedings in the action, and, even if the sale is in all respects valid, acquires no greater right and no better title than the person whose property was sold.—Goulding Fertilizer Co. v. Blanchard, Ala., 59 So. 485.

82.——Foreclosure.—Where mortgaged prop-

erty is subject to foreclosure and sale for a matured obligation, its proceeds will be applied to the payment of the whole amount of the debt or debts secured on the property sold, whether due or not.—Equitable Trust Co. of New York v. Standard Cordage Co., N. J., 84 Atl. 207.

83. **Negligence**—Proximate Cause.—"Proximate cause" is that which in a natural sequence, unbroken by an intervening cause, produces an event which could not have otherwise occurred. Nehring v. Connecticut Co., Conn., 84 Atl. 301.

84. **Partnership**—Defective Incorporation.—Where persons engaged in a manufacturing enterprise become partners through invalidity of corporate organization, a receiver is properly appointed to wind up the affairs and distribute the profits, they having ceased business.—Smith v. Schoodoc Pond Packing Co., Me., 84 Atl. 268.

85.——Joint and Several Debt.—Where a firm was eo nomine a party to obligations, the debt was the joint and several obligation of all of the partners.—T. S. Faulk & Co. v. Hobbie Grocery Co., Ala., 59 So. 450.

86.——Tortfeasors.—Though under Civ. Code 1910, partners are not responsible for torts committed by a copartner, yet if all the partners join in the commission of a tort within the scope of the partnership business, the partnership, as well as the members of the firm, may be liable.—Corbett & Taylor v. Connor, Ga., 75 S. E. 492.

87. **Party Walls**—Opening Windows In.—That plaintiff had not paid any part of the cost of the construction of a party wall, and had not attempted to use the same, held no defense to a suit to restrain defendant from opening windows therein and to compel the closing of openings already made.—Humane Society v. Ryan, 137 N. Y. Supp. 74.

88. **Penalties**—Pleading.—A petition to recover a statutory penalty must allege the necessary facts with the same degree of certainty as is required in an indictment.—Kansas City, M. & O. Ry. Co. of Texas v. Cole, Tex., 149 S. W. 753.

89. **Principal and Surety**—Guarantor.—A "surety" is usually bound with his principal by the same instrument, executed at the same time and on the same consideration, and he is an original debtor, and his liability is immediate and direct, while a "guarantor" is one who undertakes by a separate undertaking to pay a debt if the debtor cannot, and the contract of guaranty is usually entered into before or after that of the principal and is often founded on a separate consideration from that supporting the contract of the principal.—W. T. Rawleigh Medical Co. v. Tarpley, Ala., 59 So. 512.

90. **Railroads**—Merger.—A railroad acquiring another by merger becomes liable for the unpaid debts and unperformed contracts for the acquired railroad and is bound by a contract between the latter and another corporation prior to the merger.—Atlanta, B. & A. R. Co. v. Atlantic Coast Line R. Co., Ga., 75 S. E. 468.

91. **Reformation of Instruments**—Mutual Mistake.—If a party applying for insurance states the facts to the agent and relies on him to write the policy, which will protect his interests, and the agent so understands, but fails by mistake to so write the contract, the mistake is mutual.—Dearborn v. Niagara Fire Ins. Co. of City of New York, N. M., 125 Pac. 606.

92. **Removal of Causes**—Employer's Liability Act.—Under the express language of the proviso to section 28 of the Judicial Code of March 3, 1911, no cause arising under Employer's Liability Act, is removable from a state court of competent jurisdiction to a federal court.—McChesney v. Illinois Cent. R. Co., U. S. D. C., 197 Fed. 85.

93. **Sales**—Breach of Contract.—A seller cannot recover for the buyer's breach for refusal to accept goods, in the absence of proof of his ability and willingness to deliver the goods according to the contract.—Dimmick v. Hendley, Md., 84 Atl. 171.

94.——Delivery.—In the absence of a provision in a contract of sale to the contrary, the place of delivery is generally the place where the goods are at the time of the sale.—Nelson v. Imperial Trading Co., Wash., 125 Pac. 777.

95.——Material Representation.—Mere expression of a salesman's opinion cannot be regarded as a material representation concerning the quality of the goods sold.—Doylestown Agr. Co. v. Brackett, Shaw & Lunt Co., Me., 84 Atl. 146.

96.——Offer.—Where an offer to buy is made by wire, it may reasonably be presumed that an answer is invited by that means of communication.—Williams v. A. C. Burdick & Co., Ore., 125 Pac. 844.

97.——Performance.—That the buyer of stone falsely states that it is not to be used on a particular job, for which the seller has unsuccessfully bid, is not such fraud as will entitle the seller to refuse to perform.—Stewart & Donohoe v. Monad Engineering Co., Del., 84 Atl. 209.

98.——Sales Act.—Under Sales Act, §§ 53, 54, 60, 63, a seller, having brought an action for the purchase price, may resell the goods.—Urbansky v. Kutinsky, Conn., 84 Atl. 317.

99. **Trade-Marks and Trade-Names**—Unlawful Competition.—That complainant used a colored strand in the manufacture of cordage so as to make check marks or spots on the finished rope did not constitute a distinguishing mark, so that defendant's use of colored strands in its cordage did not constitute unlawful competition.—Samson Cordage Works v. Puritan Cordage Mills, U. S. D. C., 197 Fed. 205.

100. **Trusts**—Laches.—Where a trustee for a long time treats the property as his own, with the knowledge of the beneficiary, who makes no conflicting claim, and the long delay works to the prejudice of the trustee or a third party, the beneficiary is barred of relief by laches.—Fleming v. Shay, Cal., 125 Pac. 761.

101.——Resulting Trust.—In equity an owner who has been defrauded of the possession or ownership may recover the property from the person who has secured it, and the title does not pass, but is held in trust, and the owner has a superior right as against the creditors, whenever the value of the property can be recovered, without causing a reduction in the pro rata distribution of the assets.—Bellevue State Bank v. Coffin, Idaho, 125 Pac. 816.

102. **Vendor and Purchaser**—Unrecorded Deed.—Possession of land under an unrecorded deed essential to place purchasers on inquiry as to the possessor's rights held not required to be such adverse possession as, if maintained for the necessary period, would ripen into title.—Sloss-Sheffield Steel & Iron Co. v. Taff, Ala., 59 So. 658.

103.——Vendor's Lien.—A vendor's lien is a right implied by law in a grantor who has reserved no express lien and taken no security to subject the land to the payment of the purchase money when the rights of others are not injured and it is equitable to do so.—Bowen v. Grace, Fla., 59 So. 563.

104. **Waters and Water Courses**—Appropriation.—An appropriator of water for irrigation has a reasonable time in which to apply water to his land after conducting it to the point of intended use.—Bennett v. Nourse, Idaho, 125 Pac. 1038.

105. **Wills**—Construction.—A bequest by a testator to his wife of a sum to be paid from the proceeds of any life insurance which might be of force on his life at the time of his death held to include policies in which the wife was named as beneficiary and to require her to account for their proceeds as part of the bequest.—Kramer v. Lyel, U. S. D. C., 197 Fed. 618.

106.——Fraud.—A will executed on the faith of a promise, honestly made, that the sole beneficiary would distribute a part of the estate among certain charities cannot be said to have been procured by fraud.—In re Everts' Estate, Cal., 125 Pac. 1058.

107.——Residuary Clause.—A general residuary clause in a will precludes intestacy as to any part of the estate of testator, unless the clear intent of the will prevents such a construction.—Holmes v. Mackenzie, Md., 84 Atl. 340.

108.——Undue Influence.—Undue influence, which will avoid a will, is not mere persuasion of testator, but such an influence as deprived him of the free exercise of his intellectual powers, exercised by coercion, imposition, or fraud, and impelling him to act in fear, a desire for peace, or some feeling which he is unable to restrain.—In re Tresidder's Estate, Wash., 125 Pac. 1034.